

86433-1

~~86710-1~~
RECEIVED

NOV 07 2011

STAMPER, RUBENS,

FILED
NOV 14 2011
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

No.

SUPREME COURT
OF THE STATE OF WASHINGTON

FILED

NOV 07 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

STEVEN F. SCHROEDER,
a married man dealing
with his sole and separate property,
Plaintiff/Petitioner,

v.

PHILLIP J. HABERTHUR, as trustee;
EXCELSIOR MANAGEMENT GROUP, LLC;
EXCELSIOR MORTGAGE EQUITY FUND, II, LLC;
JAMES HANEY; and CLS MORTGAGE, INC.,
Defendants/Respondents.

PETITION FOR REVIEW
Of Court Of Appeals, Case No. 290352

Matthew F. Pfefer, WSBA # 31166
CARUSO LAW OFFICES
Attorneys for Plaintiff/Petitioner Schroeder
1426 W Francis Ave. 2nd Floor
Spokane Washington 99205
(509) 323-5210

ORIGINAL

TABLE OF CONTENTS

A. IDENTITY OF PETITIONER	1
B. COURT OF APPEALS DECISION	1
C. ISSUES PRESENTED FOR REVIEW	1
D. STATEMENT OF THE CASE	1
E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED	7
<u>Is the Court of Appeals' Limiting the Equitable Powers of the Superior Court Contrary to the Constitution of the State of Washington in the context of Non-Judicial Foreclosures an Issue of Substantial Public Interest? ...</u>	7
F. CONCLUSION	9

TABLE OF AUTHORITIES

Cases

<u>Blanchard v. Golden Age Brewing Co.</u> , 188 Wash. 396, 415, 63 P.2d 397 (1936).....	7
<u>Bowcutt v. Delta North Star Corp.</u> , 95 Wn. App. 311, 319, 976 P.2d 643 (1999).	7, 8
<u>In re Marriage of Major</u> , 71 Wn. App. 531, 534, 859 P.2d 1262 (1993).....	8
<u>Orwick v. City of Seattle</u> , 103 Wn.2d 249, 251, 692 P.2d 793 (1984).....	8
<u>State v. Werner</u> , 129 Wn.2d 485, 496, 918 P.2d 916 (1996).....	8

Statutes

RCW 61.24.130.....	8
--------------------	---

Rules

CR 65(b).....	4
---------------	---

Constitutional Provisions

Article IV, §6, of the Washington State Constitution.....	7
---	---

A. IDENTITY OF PETITIONER

Steven F. Schroeder asks this court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition.

B. COURT OF APPEALS DECISION

The Court of Appeals entered its opinion in this matter on October 6, 2011. A copy of the decision is in the Appendix at pages A-1 through 14.

C. ISSUES PRESENTED FOR REVIEW

Does this decision of the Court of Appeals limit the equitable powers of the superior court contrary to the Constitution of the State of Washington?

D. STATEMENT OF THE CASE

Steven F. Schroeder is the appellant landowner who is petitioning for review here and, at the time this case began, owned property in Stevens County, Washington. CP 8.

On March 31, 2009, Mr. Schroeder executed a deed of trust on this property to Defendant Excelsior Mortgage Equity Fund II, LLC. CP 10.

The Defendants who were involved in lending the funds to Mr. Schroeder never made any inquiries as to Mr. Schroeder's ability to make the payments he was agreeing to make in the loans they brought to him. CP 11. The fees and other expenses incurred by the Lender Defendants and added to the amount owed on the property have stripped so much equity from the property that re-financing is impossible. CP 11.

Mr. Schroeder has made numerous attempts to re-finance the property to satisfy the obligation there-under. CP 11-12. Each such attempt has failed due to the lack of equity in the property due to the fees and other expenses amassed by the Lender Defendants. CP 12.

Mr. Schroeder told the Lender Defendants that his sources of income were farming and logging, which

included his logging timber from the property. CP 12.

In spite of the fact that the Lender Defendants knew that logging timber from the property is a major source of income for Mr. Schroeder, the Deed of Trust gives Defendant Excelsior Management Group, LLC, and Defendant Excelsior Mortgage Equity Fund II, LLC, a security interest in the "timber to be cut" on the property. CP 12.

Defendant Excelsior Management Group, LLC, and Defendant Excelsior Mortgage Equity Fund II, LLC, through their agents, have instructed Plaintiff that he may not log timber from the property because of their security interest. CP 12.

The security interest of Defendant Excelsior Management Group, LLC, and Defendant Excelsior Mortgage Equity Fund II, LLC, in the "timber to be cut" on the property has made it impossible for Mr. Schroeder to make the payments. CP 12.

At the time this lawsuit began, Defendant Phillip Justin Haberthur was the trustee of the 2009 Trust Deed. CP 12; 4. The Trustee executed a Notice of Foreclosure and Notice of Trustee's Sale on November 6, 2009. CP 13.

The abusive, predatory lending practices of the Lender Defendants were the basis of the Verified Amended Non-Superseding Complaint for Injunctive and Equitable Relief and For Damages, filed on February 16, 2010. CP 8-17.

Pursuant to CR 65(b), Mr. Schroeder appeared on February 16, 2010 before the trial court and requested an ex parte temporary restraining order due to the imminency of the pending trustee's sale. CP 43-44. Based on the Lender Defendants' abusive, predatory lending practices, the temporary restraining order also set a hearing on March 2, 2010 for the Trustee to show cause why the Court should not enter a preliminary injunction.

CP 44.

The trial court entered the ex parte temporary restraining order on February 16, 2010. CP 43-44.

The Excelsior Defendants and the Trustee Defendant moved to dissolve the ex parte temporary restraining order. CP 45. The trial court dissolved the ex parte temporary restraining order on February 19, 2010. CP 45-51. On his own behalf and on behalf of the Excelsior Defendants, the Trustee Defendant sent his proposed order dissolving the order to the trial court. Id. The Trustee Defendant's office faxed the proposed order from Vancouver, Washington to the trial court on February 19, 2010. CP 49. The Trustee Defendant was not physically present before the trial court during the hearing on his motion to dissolve the restraining order. During that hearing, the Trustee Defendant was at his office in Vancouver, Washington.

Shortly thereafter, the Trustee Defendant and the Excelsior Defendants filed a motion for summary judgment. See CP 57, *et seq.* The remaining defendants joined the motion as well. See CP 118-119.

With his response to the motion for summary judgment, Mr. Schroeder also moved the Court to continue the hearing on summary judgment (CP 54-56). The Defendants opposed Mr. Schroeder's motion to continue the summary judgment. See, e.g., CP 119.

At the hearing on April 6, 2010, the Court denied Mr. Schroeder's motion for continuance (CP 114-116) and granted the Defendants' motion for summary judgment. The Court signed the Order granting Summary Judgment on April 14, 2010. CP 117-123.

Mr. Schroeder appealed the summary judgment on May 11, 2010. CP 132.

Mr. Schroeder opposed a later motion by the Excelsior Defendants and Defendant Haney for improper

attorney fees. CP 124-130. The Court granted most of the requested attorney fees on May 27, 2010. CP 140-143.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Is the Court of Appeals' Limiting the Equitable Powers of the Superior Court Contrary to the Constitution of the State of Washington in the context of Non-Judicial Foreclosures an Issue of Substantial Public Interest?

"Superior courts and district courts have concurrent jurisdiction in cases in equity." Article IV, §6, of the Washington State Constitution. The inherent powers of the superior court include "all powers of the English chancery court." Blanchard v. Golden Age Brewing Co., 188 Wash. 396, 415, 63 P.2d 397 (1936). The Washington State Constitution prohibits the Legislature from "abrogating or restricting these equitable powers." Bowcutt v. Delta North Star Corp., 95 Wn. App. 311, 319, 976 P.2d 643 (1999).

Any "legislation that diminishes the superior court's constitutional injunctive powers is void." State v. Werner,

129 Wn.2d 485, 496, 918 P.2d 916 (1996) (as cited by Bowcutt, 95 Wn. App. at 319) (citation omitted). In the State of Washington, the courts read possible exceptions to superior court jurisdiction **narrowly**. Orwick v. City of Seattle, 103 Wn.2d 249, 251, 692 P.2d 793 (1984). A statute should not be construed as imposing a limitation on the jurisdiction of the superior court unless “the Legislature clearly indicates its intent to limit jurisdiction. In re Marriage of Major, 71 Wn. App. 531, 534, 859 P.2d 1262 (1993).

Mr. Schroeder denies that the Legislature intended to eliminate recourse to any statute other than RCW 61.24.130. Even if the Legislature intended to eliminate such recourse, under argument (not conceded), this Court should interpret RCW 61.24.130 in a way that does no violence to the Washington State Constitution’s clear provisions regarding the authority of the superior court.

Consequently, this Court should reject the

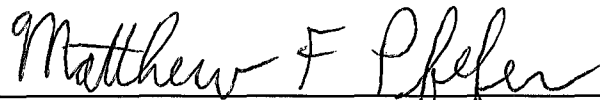
Respondents' attempt to limit the authority of the superior court to issue a temporary restraining order to prevent a trustee's sale.

F. CONCLUSION

This petition lies at the intersection of the tidal wave of foreclosures sweeping the State of Washington and the clear authority invested in the Superior Courts by the Constitution of the State of Washington. For these reasons, this petition involves an issue of substantial public interest that the Supreme Court should determine.

In conclusion, Mr. Schroeder asks this Court to reverse the opinion of the Court of Appeals based on its conflict with the Constitution of the State of Washington.

Respectfully submitted this 7th day of November 2011.


Matthew F. Pfefer, WSBA #31166

CARUSO LAW OFFICES

Attorneys for Petitioner Steve Schroeder

1426 W Francis Ave

Spokane WA 99205

(509) 323-5210

DECLARATION OF SERVICE

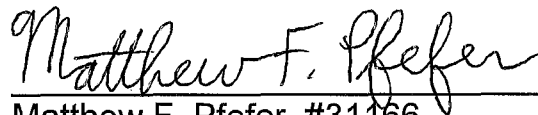
I declare under penalty of perjury under the laws of the State of Washington that the following is true and correct:

1. I am the attorney of record for the Petitioner, am over the age of 18, am competent to testify, and make these statements upon my own personal knowledge.

2. I have a written agreement with Phillip J. Haberthur of Schwabe, Williamson & Wyatt, P.C., and Dianne K. Rudman as attorneys for Respondents allowing service by email.

3. I served the document to which this declaration is attached on the date of this declaration via email to PHaberthur@schwabe.com, HDumont@schwabe.com, RHigbie@schwabe.com, CRussillo@schwabe.com, and rudmanlawoffice@gmail.com.

Signed this 7th day of November 2011 in Spokane, Washington.



Matthew F. Pfefer, #31166
CARUSO LAW OFFICES
Attorneys for Petitioner

1426 W Francis Ave
Spokane WA 99205
(509) 323-5210

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STEVEN F. SCHROEDER, a married
man dealing with his sole and separate
property,

Appellant,

v.

PHILLIP J. HABERTHUR, as trustee
of a deed of trust, EXCELSIOR
MANAGEMENT GROUP, LLC, an
Oregon limited liability company,
EXCELSIOR MORTGAGE EQUITY
FUND II, LLC, an Oregon limited
liability company, JAMES HANEY, and
CLS MORTGAGE, INC., a Washington
corporation,

Respondents.

No. 29035-2-III

Division Three

UNPUBLISHED OPINION

Sweeney, J. — RCW 61.24.130 provides the only means to restrain a trustee's sale of real property pursuant to a deed of trust, absent a showing of criminal fraud. The landowner/grantor of the deed of trust here nonetheless moved ex parte within a few days of the proposed sale to restrain the sale. He did so despite months of advanced notice of

the creditor/grantee's intent to sell the property pursuant to the deed of trust. We conclude that the superior court correctly dissolved the temporary restraining order that restrained the sale, properly ordered that the sale could proceed, and properly awarded attorney fees. Accordingly, we affirm the order dismissing the landowner's complaint for a permanent injunction and also award fees and costs on appeal.

FACTS

This is the second time these parties and this dispute have reached this court. *Schroeder v. Excelsior Mgmt. Group, LLC*, No. 29124-3-III (Wash. Ct. App. June 23, 2011) (*Schroeder I*) (unpublished).

In 2007, Mr. Schroeder borrowed money from Excelsior Management Group LLC.¹ The loan was secured by a deed of trust on his Stevens County property. The deed of trust warranted that the property was not being used principally for agricultural purposes, and would not be used for such purposes in the future without Excelsior's consent. James Haney and CLS Mortgage Inc. were the brokers of the deal.

In 2008, Mr. Schroeder defaulted on the loan. Excelsior started nonjudicial foreclosure proceedings on the property pursuant to the deed of trust. The trustee

¹ Excelsior Management Group LLC is the manager of codefendant Excelsior Mortgage Equity Fund II LLC. Rights, title, and interest to certain securities may have been transferred between the defendants.

scheduled a sale in January 2009. Mr. Schroeder sued in Stevens County to stop the sale. He claimed that the property was agricultural and, therefore, only subject to judicial foreclosure. Excelsior responded by filing an action to judicially foreclose on the property.

The parties negotiated a settlement before the foreclosure. Excelsior agreed to stop the judicial foreclosure action if Mr. Schroeder signed a new promissory note and a deed of trust. Mr. Schroeder also agreed to waive any right to request judicial foreclosure in the future by a claim that the property was being used for agricultural purposes. And he agreed not to use the property for agricultural purposes without Excelsior's agreement. Mr. Schroeder signed the new promissory note and deed of trust. The new deed of trust again warranted that the "[p]roperty has not been used, and will not be used, for agricultural purposes." Clerk's Papers (CP) at 189. Phillip J. Haberthur was the appointed trustee.

In April 2009, the parties memorialized the agreement in a stipulated motion and order of dismissal. Mr. Schroeder's attorney signed the order. It read in part:

1. Schroeder has knowingly waived any and all right he may have to judicial foreclosure of the subject property on the grounds it is used for agricultural purposes,
2. Schroeder shall not be allowed to again allege that the subject property is used for agricultural purposes,
3. Any future deed of trust executed by Schroeder to [Excelsior], an associated company or assigns, need not be judicially foreclosed but may

be foreclosed nonjudicially in accordance with RCW Chapter 61.24.

CP at 346-48. The court then dismissed Mr. Schroeder's suit with prejudice.

The first appeal addressed a motion by Mr. Schroeder to vacate the stipulated order of dismissal. He claimed that he never agreed to the provisions of the order and never authorized his attorney to sign it. The superior court denied the motion. We affirmed the superior court's denial after concluding that Mr. Schroeder knowingly authorized the stipulated order. *Schroeder I*, slip op. at 8.

Mr. Schroeder again defaulted on the new loan and Excelsior again started non-judicial foreclosure proceedings. In November 2009, Excelsior served Mr. Schroeder with a notice of foreclosure and a notice of trustee's sale. The sale was set for 11:00 a.m., February 19, 2010, in the lobby of the Stevens County Courthouse. The notices spelled out his right to restrain the sale pursuant to RCW 61.24.130 and that a failure to do so "may result in waiver of any proper grounds for invalidating the Trustee's Sale." CP at 218.

On February 8, 2010, Mr. Schroeder sued Mr. Haberthur, as trustee of the deed of trust, in Stevens County Superior Court to stop the sale. He again claimed that the property was being used for agricultural purposes and, therefore, had to be judicially foreclosed. Mr. Schroeder also filed a motion to restrain the trustee's sale, which he

noted for hearing on February 16, 2010. Mr. Haberthur contacted Mr. Schroeder's attorney and informed him that the parties had already litigated the issue of whether the property needed to be foreclosed judicially. Mr. Schroeder's attorney responded and struck the hearing on his motion to restrain the sale.

But then, on February 15, 2010, Mr. Schroeder amended his complaint to allege that the loan was made in violation of the Consumer Protection Act (ch. 19.86 RCW), and prepared a motion for a preliminary injunction pursuant to CR 65(b). CP at 8-17, 146-51. The amended complaint added as codefendants: Excelsior Management Group LLC, Excelsior Mortgage Equity Fund II LLC, James Haney, and CLS Mortgage Inc. CP at 8. He notified Mr. Haberthur that same evening by e-mail of his intent to appear the following day to request a temporary restraining order (TRO) on the February 19, 2010, sale. On February 16, 2010, Mr. Schroeder appeared before the court, ex parte, and obtained the TRO. The TRO required Mr. Schroeder to post a \$5,000 bond. A hearing was set for March 2, 2010, to show cause why the TRO should not become a preliminary injunction.

Mr. Haberthur moved to dissolve the TRO. He argued that Mr. Schroeder failed to provide the minimum five days' notice required under RCW 61.24.130(2). On the morning of February 19, 2010, the court heard argument from the parties and dissolved

the TRO. The trial judge concluded that the notice requirements had not been met under the statute and authorized Mr. Haberthur to proceed with the sale that day:

[T]his limit in 61.24.130, that there has to be at least five days' advance notice, that wasn't complied with here.

....

And I conclude that it would not be appropriate for me to—restrain the sale, that the sale should go through, go ahead, because of failure to comply with the five-day notice.

And I do that because here in this case it worked an unfairness on the trustee. . . .

....

... [It is] my intention, that the sale would go ahead as it was scheduled.

Report of Proceedings (RP) at 14-16. Mr. Schroeder did not appeal the court's order.

The property was sold on February 19, 2010. Excelsior then moved for summary dismissal of Mr. Schroeder's lawsuit under the Deeds of Trust Act's² waiver provision. Mr. Schroeder moved to continue the summary judgment hearing pursuant to CR 56(f) and to consolidate the case with the other pending case involving Excelsior. The court denied both of Mr. Schroeder's motions. In April 2010, the court granted Excelsior's motion for summary dismissal. The court also concluded that the suit was frivolous and granted attorney fees and costs to Excelsior in the amount of \$18,110.25 and to Mr. Haney in the amount of \$2,702.50.

² Ch. 61.24 RCW.

DISCUSSION

We review a trial court's summary judgment grant de novo. *Hiatt v. Walker Chevrolet Co.*, 120 Wn.2d 57, 65, 837 P.2d 618 (1992). Summary judgment is proper where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c).

Summary Dismissal of TRO and Order of Sale

The parties present extensive argument on whether Washington's Deeds of Trust Act the only way to restrain a trustee's sale once the grantor has received notice of sale and foreclosure. Clearly, it is. See *Plein v. Lackey*, 149 Wn.2d 214, 226, 67 P.3d 1061 (2003); *Cox v. Helenius*, 103 Wn.2d 383, 388, 693 P.2d 683 (1985); *CHD, Inc. v. Boyles*, 138 Wn. App. 131, 137, 157 P.3d 415 (2007); *In re Marriage of Kaseburg*, 126 Wn. App. 546, 558, 108 P.3d 1278 (2005). The question is then whether Mr. Schroeder failed to restrain the trustee's sale in the manner required by RCW 61.24.130.

Under the Deeds of Trust Act, a grantor may bring a court action to restrain the sale "on any proper . . . ground." RCW 61.24.130(1). But the trial court may not grant an injunction unless the grantor has given the trustee five days' notice of the hearing and paid the clerk of the court the bonded amount. RCW 61.24.130(2). If a party fails to restrain a sale, the act makes no provision for setting aside the sale after it has occurred.

Plein, 149 Wn.2d at 228. In fact, a party waives “any objection to the trustee’s sale . . . where presale remedies are not pursued.” *Id.* at 229. Waiver will result when a party (1) receives notice of the right to enjoin the sale, (2) has actual or constructive knowledge of a defense to foreclosure before the sale, and (3) failed to bring an action to obtain a court order enjoining the sale. *Id.* at 227.

Mr. Schroeder does not dispute the fact that the appropriate notices were given. Appellant’s Br. at 13. And those notices included a warning of the possibility of waiver if he failed to restrain the trustee’s sale. Mr. Schroeder received the notices over 90 days prior to the February 19, 2010 trustee’s sale. He waited, however, until 10 days before the scheduled trustee’s sale to file an action to restrain the sale pursuant to RCW 61.24.130. Mr. Schroeder then struck the hearing on that motion after he realized that he could not argue the property was agricultural due to the stipulated order of dismissal—which, again, this court has already concluded was valid.

In an attempt to avoid the requirements of RCW 61.24.130, Mr. Schroeder then amended his complaint to allege Consumer Protection Act claims and moved to restrain the sale under CR 65(b). He appeared before the trial court, *ex parte*, three days before the scheduled sale and obtained a TRO. Mr. Schroeder only notified the trustee, Mr. Haberthur, the evening prior by e-mail. He, then, failed to comply with the five-day

notice provision in RCW 61.24.130(2) and the court had no authority to enjoin the sale.

The Deeds of Trust Act was designed to avoid time-consuming foreclosure proceedings and remains “the only means by which a grantor may preclude a sale once foreclosure has begun.” *Plein*, 149 Wn.2d at 226 (quoting *Cox*, 103 Wn.2d at 388).

In *Plein*, the grantor received notice of the foreclosure and sale and was alerted of his right to seek an injunction to restrain the sale. *Id.* The grantor brought a complaint seeking a permanent injunction but never sought a preliminary injunction to stop the sale as required under RCW 61.24.130. *Id.* Our Supreme Court held that simply filing suit to enjoin the sale without following the specific statutory procedures will not stop the sale. *Id.* at 227. The court went on to emphasize that a contrary holding would “render the requirements of RCW 61.24.130 meaningless because it would be unnecessary to obtain an actual order restraining the sale or to provide five days’ notice to the trustee and payment of amounts due on the obligation.” *Id.*

Mr. Schroeder cites *Bowcutt v. Delta North Star Corp.* for the proposition that injunctive relief is available to enjoin a trustee’s sale separate and apart from the Deeds of Trust Act. 95 Wn. App. 311, 319, 976 P.2d 643 (1999). *Bowcutt* is distinguishable. It involved violations of the Criminal Profiteering Act (ch. 9A.82 RCW). *Bowcutt*, 95 Wn. App. at 318-19. There are no allegations nor any suggestion of criminal profiteering

here. We concluded in *Bowcutt* that a court may restrain a nonjudicial foreclosure sale under the criminal profiteering statute without the bond required by the Deeds of Trust Act. *Id.* at 320. We invoked equity: “[r]emedies involving fraud are within the exclusive equitable jurisdiction of the court.” *Id.* Here, Mr. Schroeder neither claimed nor showed that he could not comply with the notice requirements of RCW 61.24.130. And RCW 61.24.130 remains the only means to restrain a sale once foreclosure has begun. *Plein*, 149 Wn.2d at 226.

Mr. Schroeder failed to restrain the trustee’s sale as required under RCW 61.24.130 and necessarily waived any right he had to contest the sale after the fact. Mr. Haberthur and Excelsior were entitled to judgment as a matter of law. We affirm the summary judgment dismissal of Mr. Schroeder’s complaint for a permanent injunction.

Motion To Continue Summary Judgment

Mr. Schroeder next contends that the court abused its discretion when it denied his motion to continue the summary judgment hearing. He argues that additional discovery would have proved that Excelsior knew the property was used for agricultural purposes; therefore, the stipulated order of dismissal was invalid.

A trial court has broad discretion to grant or deny a continuance. The court’s decision will only be overturned for manifest abuse of discretion. *Colwell v. Holy Family*

Hosp., 104 Wn. App. 606, 615, 15 P.3d 210 (2001). A trial court may deny a CR 56(f) motion for a continuance when “(1) the requesting party does not have a good reason for the delay in obtaining the evidence, (2) the requesting party does not indicate what evidence would be established by further discovery, or (3) the new evidence would not raise a genuine issue of fact.” *Butler v. Joy*, 116 Wn. App. 291, 299, 65 P.3d 671 (2003).

The discovery Mr. Schroeder sought would not raise a genuine issue of fact; the questions before the court were questions of law. The question was whether Mr. Schroeder failed to restrain the trustee’s sale as required by RCW 61.24.130 and thus waived his right to contest the sale. *See Plein*, 149 Wn.2d at 227. It is of no consequence that Mr. Schroeder could prove the property was once agricultural or that Excelsior knew that. And we have already determined that Mr. Schroeder knowingly waived his right to claim the property was agricultural. *Schroeder I*, slip op. at 8.

The trial court then had very tenable grounds for denying the continuance, as the discovery request for the lender’s file was not necessary.

Attorney Fees—Excelsior and Mr. Haney

Mr. Schroeder also assigns error to the trial court’s award of attorney fees to Excelsior and Mr. Haney, arguing that the trial court cannot award attorney fees under the deed of trust because that document was not specifically challenged. He further argues

that the claim was not frivolous.

The deed of trust provides for reasonable attorney fees in any “suit or action . . . instituted to enforce or interpret any of the terms” of the deed of trust. CP at 125. RCW 4.84.330 provides that in “any action on a contract,” the prevailing party shall be entitled to reasonable attorney fees. Based on this statute, this court has held that when a grantee successfully defends an action based on a deed of trust, the grantee is entitled to attorney fees. *Boyles*, 138 Wn. App. at 140-41. Excelsior and Mr. Haney are then entitled to attorney fees for successfully defending the trustee’s sale.

Moreover, the court did not abuse its discretion in awarding fees based on the frivolous nature of Mr. Schroeder’s claims. *See Biggs v. Vail*, 119 Wn.2d 129, 136, 830 P.2d 350 (1992) (lawsuit is frivolous if it cannot be supported by any rational argument based in fact or law).

Attorney Fees on Appeal

Both parties request fees on appeal. RAP 18.1. The deed of trust includes a provision awarding attorney fees to the prevailing party. As the prevailing parties on appeal, Excelsior and Mr. Haney are entitled to their fees and costs.

Again, we affirm the trial court’s summary judgment dismissal of Mr. Schroeder’s complaint for a permanent injunction and award fees and costs to Excelsior and Mr.

No. 29035-2-III
Schroeder v. Haberthur

Haney.

No. 29035-2-III
Schroeder v. Haberthur

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

WE CONCUR:

Sweeney, J.

Korsmo, A.C.J.

Brown, J.